FILED
95-287 AUG 18 1995
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

THOMAS J. ELEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ARTHUR HUNTLEY JOHNSON
P.O. Box 1322
Gainesville, Florida 32602
(904) 372-6947
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER PROBABLE CAUSE TO ARREST VEHICLE OCCUPANTS FOR MARIJUANA TRAFFICKING, WITHOUT PARTICULARIZED, ARTICULABLE FACTS ABOUT SUSPECTED CONTRABAND OR ITS LOCATION WITHIN THE VEHICLE PROVIDES THE REQUISITE PROBABLE CAUSE TO PERMIT A WARRANTLESS SEARCH OF THEIR ENTIRE VEHICLE INCLUDING THE TRUNK AND CONTAINERS THEREIN CONSISTENT WITH THE FOURTH AMENDMENT?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE WRIT 8

THE DECISION THAT PROBABLE CAUSE TO ARREST VEHICLE OCCUPANTS FOR MARIJUANA TRAFFICKING WITHOUT PARTICULARIZED, ARTICULABLE FACTS ABOUT SUSPECTED CONTRABAND OR ITS LOCATION IN THE VEHICLE PROVIDES PROBABLE CAUSE TO PERMIT A WARRANTLESS SEARCH OF THEIR ENTIRE VEHICLE, INCLUDING THE TRUNK, ITS CONTENTS, AND CONTAINERS THEREIN, CONFLICTS WITH DECISIONS OF THIS COURT AND THE UNITED STATES COURTS OF APPEAL 8

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

California v. Acevedo, 111 S.Ct. 1982 (1991) 9, 10, 12, 13, 14, 16

Colorado v. Bertine, 479 U.S. 367 (U.S. Supr. Ct. 1987) 16

Florida v. Wells, 495 U.S. 1 (U.S. Supr. Ct. 1990) 16

South Dakota v. Opperman, 428 U.S. 364 (U.S. Supr. Ct. 1976) 16

United States v. Brown, 616 F.Supp. 1319 (D.C. D.C. 1985) 10, 14

United States v. Dixon, 1 F.3d 1080 (10th Cir. 1992) 11, 15

United States v. Foxworth, 8 F.3d 540 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 1414 ..... 11, 15

United States v. Fryer, 974 F.2d 813 (7th Cir. 1992), *cert. denied* 113 S.Ct. 2418 ..... 9, 11, 15

United States v. Hogan, 25 F.3d 690 (8th Cir. 1994)... 12, 15

United States v. Horne, 4 F.3d 579 (8th Cir. 1993) *Rehrg. and sugg. for Rehrg. en Banc denied, cert. denied* 114 S.Ct. 1121 ..... 11, 15

United States v. Howard, 991 F.2d 195 (5th Cir. 1993), *cert. denied* 114 S.Ct. 395 ..... 11, 15

United States v. Infante-Ruiz, 13 F.3d 498 (1st Cir. 1994) 15, 16

United States v. McQuagge, 787 F.Supp. 637 (E.D. Tex. 1991), *aff'd, U.S. v. Mallory*, 8 F.3d 23 (5th Cir. 1993) 11, 14

United States v. Markling, 7 F.3d 1309 (7th Cir. 1993) 11, 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Powell, 929 F.2d 1190 (7th Cir. 1991) *cert. denied* 112 S.Ct. 584 ..... 9, 13

United States v. Ross, 456 U.S. 798 (1982) 9, 10, 16

United States v. Spears, 965 F.2d 262 (7th Cir. 1992) *cert. denied* 113 S.Ct. 502 9

United States v. Wider, 951 F.2d 1283 (D.C. Cir. 1991) 11, 14

United States v. Wright, 16 F.3d 1429 (6th Cir. 1994), *cert. denied* 114 S.Ct. 2759 ..... 12, 15

United States v. Young, 38 F.3d 338 (7th Cir. 1994) 9

STATUTES

18 U.S.C. § 3231 3

18 U.S.C. § 3237 3

21 U.S.C. § 841(a)(1) 3

21 U.S.C. § 846 3

28 U.S.C. § 1254(1) 2

OTHER

AMENDMENT IV, U.S. CONSTITUTION ..... *passim*

AMENDMENT V, U.S. CONSTITUTION 2

No. _____

In The

Supreme Court of the United States

October Term, 1995

THOMAS J. ELEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished order of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the district court is not reported (7th Cir. April 17, 1995). (*Pet. App. p.1a-6a*). Eley's Petition for Rehearing with Suggestion for Rehearing en Banc was denied and is not reported. (7th Cir. May 22, 1995). (*Pet. App. p.7a*).

The opinion of the United States District Court for the Southern District of Illinois denying Petitioner's Motion to Suppress evidence is not reported, but the transcript of the hearing on the Motion to Suppress is contained as part of the appendix. (*Pet. App. p.8a-63a*).

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment following oral argument on April 17, 1995, affirming the district court's ruling concerning the searches of Mr. Eley's vehicle. The United States Court of Appeals for the Seventh Circuit's Order Denying Eley's Petition for Rehearing with Suggestion for Rehearing en Banc was filed on May 22, 1995. This Court has jurisdiction pursuant to *28 U.S.C. § 1254(1).*

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV, United States Constitution, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . particularly describing the place to be searched, and the persons or things to be seized.

Amendment V, United States Constitution, provides, in pertinent part:

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Thomas J. Eley was arrested on February 15, 1994 in Indianapolis, Indiana and charged with violations of *21 U.S.C. § 841(a)(1)* and *21 U.S.C. § 846*, to wit: that he knowingly conspired to possess with intent to distribute and conspired to distribute marijuana, a Schedule I Non-Narcotic Controlled Substance in excess of 100 kilograms.

The United States District Court for the Southern District of Indiana acquired jurisdiction pursuant to *18 U.S.C. §§ 3231, 3237*. Trial counsel, Robert W. Hammerle, Esquire filed a Motion to Suppress evidence found during a search of Eley's vehicle at the time of his arrest and during a subsequent search conducted six to seven hours after arrest, claiming the warrantless searches violated Mr. Eley's Fourth Amendment rights. The trial court denied the Motion to Suppress and held, "And so there was probable cause to make the arrest and I think certainly probable cause to search the car they were in when they were arrested."[1] Mr. Eley was convicted by a jury of his peers on July 12, 1994 and was sentenced to six years in the custody of the United States Bureau of Prisons commencing August 30, 1994. Mr. Eley's appeal and this petition for writ of certiorari focus on Fourth Amendment issues concerning the searches of Mr. Eley's vehicle, to which the Motion to Suppress was directed.

---

[1] Transcript of the hearing on the Motion to Suppress, held April 12, 1994, before the Honorable S. Hugh Dillin. The transcript is part of the appendix at pages 12a-65a. (Hereinafter references to the transcript of the hearing on the Motion to Suppress will be made with the abbreviation *Pet. App.* ___. The reference to the quotation above would be *Pet. App. p.65*).

On February 14, 1994, Officer Matthew Funderburk of the Missouri State Highway Patrol made a traffic stop of a vehicle driven by Delbert Wayne Moyers. *Pet. App. p.14a.* Subsequent to the stop, it was determined that Mr. Moyers' vehicle contained approximately 350 pounds of marijuana. *Pet. App. p.14a.* Mr. Moyers was placed under arrest for possession of marijuana and was transported to the State Police headquarters in Springfield, Missouri, where he was met by D.E.A. Agent Bob Dwyer. *Pet. App. p.3a.* Dwyer questioned Mr. Moyers and learned that he was transporting the marijuana to Indianapolis. *Pet. App. p.3a, 15a.* Moyers agreed to cooperate with D.E.A. by making a controlled delivery of the marijuana to Indianapolis. *Pet. App. p.3a,14a,16a.* Agent Dwyer contacted D.E.A. Agent Michael Cates in Indianapolis and apprised him of the situation. *Pet. App. p.3a,14a.*

Agent Dwyer transported Mr. Moyers to Indianapolis where they met with Agent Cates at D.E.A. headquarters. *Pet. App. p.4a,16a.* Cates learned that Moyers was to deliver the marijuana to two individuals, Phillip Joseph Loret and Allen Eugene Hartley. *Pet. App. p.4a,15a,19a.* A criminal history check revealed that Hartley had outstanding warrants for trafficking in marijuana and that he had a reputation for carrying firearms. *Pet. App. p.20a,21a.* Law enforcement personnel anticipated Loret and Hartley would be a part of the transaction, but had no information concerning the involvement of other individuals or anyone named Thomas Eley. *Pet. App. p.19a,26a.*

Upon arrival in Indianapolis, Moyers was to contact Hartley and Loret through a pager number. *Pet. App. p.17a.* Cates arranged for Mr. Moyers to call the pager number from D.E.A. headquarters. *Pet. App. p.17a.* Hartley

responded to the pager and directed Moyers to get a hotel room. *Pet. App. p.17a.*

Cates selected a Motel 6™ as the site where the controlled delivery would be monitored and Moyers checked in. *Pet. App. p.18a.* A transmitter was placed on Moyers' person to monitor any conversations in the room. *Pet. App. p.18a.* Moyers made another telephone call to the pager number and awaited a response. *Pet. App. p.18a.* Hartley advised that he would arrive at Moyers' hotel in approximately 1.5 hours. *Pet. App. p.22a.* Cates instructed Moyers to wait in the hotel room until Hartley and Loret arrived. *Pet. App. p.22a.* Moyers could not provide any specific information concerning the actual exchange and related his belief that the transaction would be completed at a farmhouse near Indianapolis. *Pet. App. p.19a,27a.*

Law enforcement personnel maintained surveillance at the Motel 6™. *Pet. App. p.22a,24a.* Moyers' vehicle, with the marijuana inside, was parked a short distance away from his room. *Pet. App. p.22a.* Around 4 p.m., a Lincoln Continental arrived and parked a short distance from the vehicle containing the marijuana. *Pet. App. p. 23a.* Hartley exited the Lincoln and proceeded to Moyers' hotel room. *Pet. App. p.23a,24a.* Shortly thereafter, Phillip Loret exited the Lincoln and entered the hotel room. *Pet. App. p.24a.* Thomas J. Eley was driving the Lincoln Continental from which Hartley and Loret exited, but Eley never left the car until he was arrested. *Pet. App. p.5a,28a,30a,41a,45a,48a.* After a brief exchange, monitored by wire, Hartley and Loret exited Moyers' room. *Pet. App. p.5a,25a.* Hartley advised Moyers that he would depart with the marijuana and return approximately 1.5 hours later with the money to complete the deal. *Pet. App.*

p.5a,31a. Loret got into the car which contained the marijuana and Hartley returned to the Lincoln Continental. *Pet. App. p.5a,25a.* At that time, law enforcement officials closed in, arrested Hartley, Loret and Eley, and seized the two vehicles. *Pet. App. p.5a,25a.* Eley's vehicle was impounded pursuant to the arrest, as law enforcement contemplated forfeiture of the vehicle under the civil forfeiture statute. *Pet. App. p.58a.* However, the vehicle was later returned to Mr. Eley. *Pet. App. p.59a.*

Detective Richard Kenney of the Indianapolis Police Department Narcotics Unit approached the Lincoln Continental and directed Mr. Eley to exit his vehicle. *Pet. App. p.48a.* Kenney further directed Eley to the rear of the vehicle to search Mr. Eley for weapons. *Pet. App. p.49a.* Detective Kenney's search failed to uncover weapons, but did reveal a film canister in Eley's shirt pocket. *Pet. App. p.49a.* Kenney opened the canister and discovered a white powdery substance, which he believed was cocaine. *Pet. App. p.50a.* Although testing confirmed Kenney's suspicion, Mr. Eley was not arrested for possession of cocaine, nor ever so charged in this case. *Pet. App. p.55a.*

Following his arrest, several members of law enforcement testified that Eley's vehicle was searched incident to arrest. *Pet. App. p.50a,55a.* The testimony as to the search of Mr. Eley's car and the circumstances surrounding the search at the scene of arrest reveals the following:

1) None of the officers who testified either at the suppression hearing or at trial opened or knew who opened the trunk of Eley's vehicle. *Pet. App. p.54a,55a,56a,57a,59a,65a.*

2) None of the officers who testified either at the suppression hearing or at trial knew how access was gained to the trunk of Eley's car. *Pet. App. p.53a,54a,55a,56a.*

3) None of the officers who testified either at the suppression hearing or at trial saw what was inside Eley's vehicle at the scene of arrest. *Pet. App. p.53a,54a,55a.*

Agent Cates testified that he neither authorized nor supervised the search of Eley's vehicle at the scene of arrest. *Pet. App. p.55a.* Cates stated that he was aware that the trunk had been gone through at the scene and was informed that scales were found in the trunk. *Pet. App. p.52a,53a.* Upon realizing the trunk had been opened by law enforcement, **Cates ordered the trunk closed** and that the car be transported to the D.E.A. office in Indianapolis. *Pet. App. p.69a.* (*emphasis added*). He did not order a further search of the vehicle. *Pet. App. p.69a.*

Six or seven hours after the car arrived at the D.E.A. office, Agent Cates and another agent conducted a search of the vehicle, anticipating forfeiture of Eley's car. *Pet. App. p.57a,58a.* During the course of the search, the agents removed some items from the vehicle but failed to make an inventory list of what was removed. *Pet. App. p.58a.* When asked if a list had been compiled, Cates responded, "No, but I have the items so that a list may be compiled." *Pet. App. p.58a.*

During the course of the searches, several items were seized. *Pet. App. p.58a.* At the Motel 6™, agents found a cardboard box containing plastic garbage bags. *Pet. App. p.52a.* During the Motion to Suppress hearing, Cates testified that the cardboard box with the garbage bags was

found in the trunk of the vehicle. *Pet. App. p.52a.* However, at trial he testified that this same item was discovered in the back passenger space of the vehicle. *Pet. App. p.68a.* Also found in the trunk of Eley's vehicle was a large mechanical bulk scale which was examined at D.E.A. headquarters. *Pet. App. p.5a,57a.*

Cates described the latter search as "a more detailed search of the vehicle," as well as a part of his further investigation. *Pet. App. p.53a.* Yet, no inventory list of what was found in the automobile was prepared. *Pet. App. p.58a.* The last item was discovered when Cates pulled back a carpet divider in the trunk, revealing a compartment containing a closed brown leather bag. *Pet. App. p.5a,53a.* Cates opened the bag which contained a large sum of money. *Pet. App. p.53a.*

REASON FOR GRANTING THE WRIT

THE DECISION THAT PROBABLE CAUSE TO ARREST VEHICLE OCCUPANTS FOR MARIJUANA TRAFFICKING WITHOUT PARTICULARIZED, ARTICULABLE FACTS ABOUT SUSPECTED CONTRABAND OR ITS LOCATION IN THE VEHICLE, PROVIDES PROBABLE CAUSE TO PERMIT A WARRANTLESS SEARCH OF THEIR ENTIRE VEHICLE, INCLUDING THE TRUNK, ITS CONTENTS, AND CONTAINERS THEREIN, CONFLICTS WITH DECISIONS OF THIS COURT AND THE UNITED STATES COURTS OF APPEAL.

After Eley and the other occupants of the vehicle were arrested, law enforcement officials engaged in a warrantless

search of the entire vehicle, including the trunk and containers found inside, absent specific, articulable facts about the nature of the suspected contraband or where it might be located in Eley's vehicle. *Pet. App. p.56a.* Although, officials testified that none of them saw the contents of Eley's car at the scene, none of them knew who opened the trunk, and none of them knew how access was gained into the trunk of Eley's vehicle at the scene, the Trial Court and the Seventh Circuit upheld the warrantless search of Eley's vehicle, including the trunk, as incident to his arrest. *Pet. App. p.53a,54a,55a,56a,57a,59a,65a.* Reciting verbatim the District Court's ruling at the suppression hearing, the Seventh Circuit states in an unpublished opinion, "Since they had probable cause to arrest the three occupants of the Lincoln for drug trafficking, they also had probable cause to search every part of the vehicle and its contents outside the motel." *Pet. App. p.7a, citing United States v. Ross,* 456 U.S. 798, 825.

The holding below misinterprets *Ross,* fashioning a rule which marks a troublesome departure from Seventh Circuit and United States Supreme Court law requiring specific, articulable facts to justify warrantless vehicle searches. *United States v. Young,* 38 F.3d 338 at 340-1 (7th Cir. 1994); *United States v. Fryer,* 974 F.2d 813 at 819 (7th Cir. 1992); *United States v. Powell,* 929 F.2d 1190 at 1196-7 (7th Cir. 1991); *United States v. Spears,* 965 F.2d 262 at 270-2 (7th Cir. 1992); *California v. Acevedo,* 111 S.Ct. 1982 at 1991 (S.Ct. 1991).

A proper reading of *Ross* dictates that the scope of a valid, warrantless search, based on clear, objective facts supporting a probable cause determination should be "no narrower and no broader than the scope of a search authorized by a warrant supported by probable cause."

Ross at 823. In *Ross*, a reliable informant provided police with the location and description of an individual who was allegedly selling narcotics out of the trunk of his car. *Id.* at 800,801. Acting on the information, the officers arrested Ross and conducted a warrantless search of his vehicle, including the trunk and its contents. *Id.* Upholding the warrantless search of the vehicle and containers therein, this Court stated that the scope of a warrantless search of an auto is "defined by the object of the search and the places in which there is **probable cause** to believe that it may be found." *Id.* at 824. (*emphasis added*).

Unlike *Ross*, the confidential informant in the instant case did not notify officials that contraband could be found in the vehicle. Instead, the officers had no information pertaining to suspected contraband or where it may have been located in Eley's vehicle. Therefore, the search of the entire vehicle, including the trunk and its contents was unsupported by probable cause and thus, unconstitutional.

While *Ross* prescribes that permissible warrantless vehicle searches are based on the facts supporting probable cause, the conclusion that probable cause to arrest vehicle occupants provides probable cause to search their entire vehicle for "tools of drug trafficking," is without authoritative support and is incompatible with the Fourth Amendment's particularity requirement. *Id. California v. Acevedo*, 111 S.Ct. 1982 at 1991 (Reviewing previous Supreme Court cases and discussing what degree of evidence constitutes probable cause and consequently, allows police to conduct a warrantless search); *United States v. Brown*, 616 F.Supp. 1319 at 1320-21 (D.C. D.C.

1985) (Probable cause to search automobile was not established by informant's statements that defendant dealt drugs and drove car regularly to his mom's house, in absence of indication that informant knew there was contraband in the car); *United States v. McQuagge*, 787 F.Supp. 637 at 654-55 (E.D. Tex. 1991), *aff'd. U.S. v. Mallory*, 8 F.3d 23 (5th Cir. 1993) (Reasonable suspicion that a defendant is involved in illegal drugs cannot, standing alone, justify a protective search of defendant's automobile.); *United States v. Wider*, 951 F.2d 1283 at 1286 (D.C. Cir. 1991) (Warrantless search of an automobile is constitutionally permissible if there is probable cause to believe a vehicle contains contraband.); *United States v. Fryer*, 974 F.2d 813 at 819 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2418 (Concerning vehicle searches, specific articulable facts are required to justify an intrusion.); *United States v. Howard*, 991 F.2d 195 at 201 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 395 (Warrantless vehicle searches are permissible when there exists probable cause that a vehicle contains contraband.); *United States v. Dixon*, 1 F.3d 1080 at 1084 (10th Cir. 1992) (A mere finding that probable cause existed for the Attorney General to conclude that a car and phone had been used pursuant to drug crimes, sufficient to warrant forfeiture, was insufficient to justify a warrantless search of the car.); *United States v. Horne*, 4 F.3d 579 at 585-6 (8th Cir. 1993) *Rehearing and Suggestion for Rehearing en banc denied; cert. denied*, 114 S.Ct. 1121; *United States v. Markling*, 7 F.3d 1309 at 1319 (7th Cir. 1993) (Warrantless vehicle search permissible if probable cause exists that car contains evidence or contraband.); *United States v. Foxworth*, 8 F.3d 540 at 545 (7th Cir. 1993) *cert. denied*, 114 S.Ct. 1414 (May conduct a warrantless search of an automobile only if

probable cause exists to believe car contains contraband or evidence of crime.); *United States v. Wright*, 16 F.3d 1429 at 1437-8 (6th Cir. 1994) *cert. denied*, 114 S.Ct. 2759 (To justify a warrantless automobile search, one needs probable cause to believe the vehicle contains evidence or contraband.); and *United States v. Hogan*, 25 F.3d 690 at 693 (8th Cir. 1994).

A *per se* rule, that probable cause to arrest an individual for drug trafficking provides requisite probable cause to search, ignores the Fourth Amendment's specific command that " . . . no warrants shall issue, but upon probable cause . . . **particularly** describing the place to be searched, and the persons or things to be seized." *Id.* (emphasis added). *California v. Acevedo*, 111 S.Ct. 1982, instructs that the scope of a *Ross*-type intrusion is based on articulable facts supporting probable cause to search. Respondent in *Acevedo* was charged with possession of marijuana for sale, a specie of drug trafficking. *Id.* at 1985. Finding that the factual particularity underlying probable cause constrained the scope of the warrantless search of Acevedo's car, the Court held that once law enforcement saw Respondent place the bag of marijuana in his trunk, the scope of the search constitutionally included the trunk, but a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment. *Id.* at 1991.

In sharp contrast to the reasoning used in *Acevedo*, the courts below rendered decisions which extend permissible warrantless vehicle intrusions to a level not previously countenanced in the United States. Moreover, a *per se* search rule similar to that fashioned by the Seventh Circuit would have permitted a search of Acevedo's

entire vehicle based on probable cause to arrest Acevedo for drug trafficking. Thus, the instant decision lies squarely in conflict with U.S. Supreme Court law, because the principles of *Acevedo* belie the conclusion that probable cause to arrest could ever, without more, provide probable cause to search.

In *United States v. Powell*, 929 F.2d 1190 (7th Cir. 1991), the Seventh Circuit reviewed a case with striking factual similarities to the case at bar. In *Powell*, a routine traffic stop led to the seizure of a large quantity of marijuana, which led to a controlled delivery by the drug courier-turned informant. *Id.* at 1192. The informant disclosed Powell's promise to give $100,000 to the informant upon delivery of the contraband. *Id.* At the point of exchange, D.E.A. agents arrested Powell and a pat-down search revealed a small amount of cocaine. *Id.* Agents searched the trunk of his car, finding a suitcase with $111,000 in cash, and a small amount of marijuana. *Id.* Upholding the search, the Seventh Circuit found probable cause from the informant's statement that Powell promised his courier $100,000 when Powell received the marijuana. *Id.* at 1196.

In Eley's case, as the Seventh Circuit's recitation of facts accurately reflects, payment was to occur after the informant's co-conspirators delivered the marijuana to a farmhouse, following the initial rendezvous at informant's motel. *Pet. App. p.19a,27a.* Eley was not the purchaser and prior to his arrival at the confidential informant's motel, his presence was unanticipated. *Pet. App. p. 19a,20a,21a,27a.* Before the arrest, agents had learned that Hartley, a federal fugitive, reputed to carry firearms, promised payment **after** he delivered the marijuana to a farmhouse. *Pet. App. p.19a,27a.* (emphasis

added). Thus, the only information available to agents in this case was that Eley chauffeured two alleged drug traffickers, in Eley's vehicle, and one of them **might** be armed. *Pet. App. p.19a,20a,28a. (emphasis added).*

Although no agent testified about probable cause or specific, articulable facts concerning suspected contraband or where it might be located in Eley's Lincoln, the Trial Court articulated the scope of probable cause in terms broad enough to encompass the entire vehicle and its contents, including intrusive searches of the trunk and containers therein. *Pet. App. p.65a.* In its unpublished opinion, which echoes the Trial Court's ill-founded holding on this issue, the Seventh Circuit writes:

> Therefore they had cause to believe that Hartley, Loret, or ***Eley's car*** in which all three had arrived would have cash and possibly a firearm. It was also reasonable for them to believe that ***other tools of drug trafficking such as a scale or ledgers*** would be in the vehicle.
> *Pet. App.p.6a (emphasis added).*

Clearly, the U.S. District Court and the Seventh Circuit Court of Appeals ignored established Fourth Amendment jurisprudence and fashioned new rules to uphold unconstitutional searches of Mr. Eley's vehicle.

By engaging in such activism, the Seventh Circuit fashioned a rule encroaching upon virtually every jurisdiction's view of Fourth Amendment protection regarding warrantless vehicle searches. *California v. Acevedo,* 111 S.Ct. 1982 at 1991; *United States v. Brown,* 616 F.Supp. 1319 at 1320-21 (D.C. D.C. 1985); *United States v. McQuagge,* 787 F.Supp. 637 at 654-55 (E.D. Tex. 1991), *aff'd., U.S. v. Mallory,* 8 F.3d 23 (5th Cir. 1993); *United States v. Wider,* 951

F.2d 1283 at 1286 (D.C. Cir. 1991); *United States v. Fryer*, 974 F.2d 813 at 819 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2418; *United States v. Howard*, 991 F.2d 195 at 201 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 395; *United States v. Dixon*, 1 F.3d 1080 at 1084 (10th Cir. 1992); *United States v. Horne*, 4 F.3d 579 at 585-6 (8th Cir. 1993) *Rehearing and Suggestion for Rehearing en banc denied; cert. denied*, 114 S.Ct. 1121; *United States v. Markling*, 7 F.3d 1309 at 1319 (7th Cir. 1993); *United States v. Foxworth*, 8 F.3d 540 at 545 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 1414; *United States v. Wright*, 16 F.3d 1429 at 1437-8 (6th Cir. 1994), *cert. denied*, 114 S.Ct. 2759; and *United States v. Hogan*, 25 F.3d 690 at 693 (8th Cir. 1994). The new rule, under *Eley*, that probable cause to arrest vehicle occupants for drug trafficking, will provide probable cause to search their entire vehicle and its contents for "tools of the trade," reflects the clear error of the District Court's probable cause assessment.

The Seventh Circuit and District Court's holdings conflict with at least one other United States Court of Appeals' precedent with striking factual similarities. In *United States v. Infante-Ruiz*, 13 F.3d 498 (1994), the First Circuit held the fact the defendant was a federal fugitive on drug trafficking charges and that other vehicle occupants were under suspicion for drug trafficking was not sufficient to establish probable cause to search the vehicle or a briefcase in the vehicle's trunk. *Id.* at 502. The First Circuit Court of Appeals noted that officers had no concrete information that defendant or other vehicle occupants were transporting drugs or weapons when stopped. *Id.* The court emphasized that the probable cause standard could not be satisfied by "conventional wisdom"

that drug traffickers carry weapons or by the "dangerous reputation" of defendant and his associates. *Id.*

Based on information provided by the confidential informant, when Hartley and Loret arrived in Eley's car, the lower courts concluded that agents had probable cause to arrest Hartley and Loret, and thus probable cause to search Eley's automobile for tools of drug trafficking such as a scale or ledgers. *App. p.6a,65a.* These are precisely the sort of undifferentiated factual predicates for probable cause rejected by the First Circuit in *Infante-Ruiz,* 13 F.3d at 502.

In upholding the search of Eley's Lincoln, the Seventh Circuit fashioned a new rule of law, extending *Ross,* and ignoring *Acevedo.* Further, the *per se* rule announced by the United States Court of Appeals for the Seventh Circuit squarely conflicts with Fourth Amendment legal principles of other federal circuits. Therefore, this case warrants consideration by this Court to address this departure from well-established constitutional principles.

The second search of Mr. Eley's vehicle, tainted by the unconstitutional intrusion at the Motel 6™, was also contrary to established law, because it failed to comport with the constitutional mandates concerning vehicle inventory searches under *South Dakota v. Opperman,* 428 U.S. 364 (U.S. Supr. Ct. 1976) and its progeny. The government failed to produce evidence that the search testified to and conducted by Case Agent Cates comported with "standardized criteria" as required in *Colorado v. Bertine,* 479 U.S. 367 (U.S. Supr. Ct. 1987), and *Florida v. Wells,* 495 U.S. 1 (U.S. Supr. Ct. 1990). Likewise,

the lower courts sustained the second search in derogation of established constitutional principles for vehicle inventories, and thus discretionary review to clarify these misapprehensions is warranted.

The greatest inequity of this case is the Seventh Circuit's use of its rule making authority to preclude review of its ill-founded decisions by defining them, by rule, to lack precedential value. According to the Seventh Circuit, the salutary objectives of unpublished opinions are the reduction of paperwork and the elimination of needless dissemination of documentation as a by-product of judicial process. In this case, the unpublished order, as defined, has no precedential value, which conceptually neutralizes the constitutionally-infirmed foundation of the decision. Succinctly, although the resolution of law enforcement's constitutional transgressions lacks a valid legal basis, the Seventh Circuit insulates its unsupported legal conclusions by defining them to lack precedential value, e.g., be subject to review. This denies Mr. Eley due process of law.

CONCLUSION

Based on the foregoing reasons, the Petitioner THOMAS ELEY respectfully requests that this Court direct a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

ARTHUR HUNTLEY JOHNSON
P.O. Box 1322
Gainesville, Florida 32602
(904) 372-6947
Attorney for Petitioner

No. _____

In The

Supreme Court of the United States

October Term, 1995

THOMAS J. ELEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

APPENDIX

TABLE OF CONTENTS

Page

JUDGMENT-WITH ORAL ARGUMENT AND UNPUBLISHED **ORDER** OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FILED APRIL 17, 1995 ..... 1a

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION'S **ORDER DENYING ELEY'S MOTION TO SUPPRESS EVIDENCE** 2a

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION'S **TRANSCRIPT OF HEARING ON PETITION ELEY'S MOTION TO SUPPRESS EVIDENCE** FILED APRIL 12, 1994 ..... 10a

ORDER DENYING ELEY'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC FILED MAY 22, 1995 ... 66a

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION'S **PARTIAL TRANSCRIPT OF TRIAL PROCEEDINGS**..... 67a

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: April 17, 1995

BEFORE:

Honorable WALTER J. CUMMINGS, Circuit Judge

Honorable JOEL M. FLAUM, Circuit Judge

Honorable DONALD E. WALTER, District Judge*

Nos. 94-3148 and 94-3190

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

THOMAS J. ELEY and PHILLIP J. LORET,
Defendants - Appellants

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division No. 94 CR 44, S. Hugh Dillin, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

---

* The Honorable Donald E. Walter of the Western District of Louisiana is sitting by designation.

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 53]

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued March 27, 1995

Decided April 17, 1995

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DONALD E. WALTER, District Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
Nos. 94-3148 *vs.* 94-3190	)	
THOMAS J. ELEY and PHILLIP J. LORET, *Defendants-Appellants.*	)	No. 94 CR 44 **S. Hugh Dillin,** *Judge.*

ORDER

A two-count indictment was returned against defendants. Count I charged them with conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 841 and 846. Count II charged them with attempting to possess and intent to distribute marijuana

---

* The Honorable Donald E. Walter of the Western District of Louisiana is sitting by designation.

in violation of the same statutory provisions. A third person, Allen Hartley, pleaded guilty to the same offenses. On August 3, 1994, both defendants were sentenced to 72 months in prison plus four years of supervised release and a fine of $5,000.

Facts

In mid-February 1994, a federal Drug Enforcement Administration Special Agent in Indianapolis was notified by another agent in Missouri that law enforcement officers had stopped a person driving there and found 320 pounds of marijuana in the vehicle. The Missouri agent informed the Indianapolis agent that Wayne Moyer, the driver of the vehicle, was willing to act as a confidential informant ("CI") and accompany law enforcement officers to Indiana to deliver the marijuana per his previous plan with members of the drug conspiracy.

Hartley testified at the trial that in January 1994 he was approached by his friend defendant Loret in Louisiana with a plan to make money by selling marijuana, which Hartley would obtain from the CI in New Mexico. When Hartley contacted the CI, the latter told Hartley that he had 5,000 pounds of marijuana for sale which he could deliver at Ruidoso, New Mexico, for $650 per pound. Hartley conveyed this information to Loret, who told Hartley that "Tom" [Eley], his Indiana buyer, would not go to Ruidoso to get the marijuana. Consequently the CI agreed to deliver the marijuana to Indiana for an additional $200 per pound.

In early 1994, Loret and Hartley traveled to El Paso, Texas (near Ruidoso, New Mexico) to see the CI and inspect the marijuana. Loret and Hartley stayed at the

Missile Inn and rented a car in El Paso. The room at the inn and the car were rented by Loret. After inspecting a few pounds of the CI's marijuana, Hartley and Loret returned to Baton Rouge, where Loret lived. A few days later Loret ordered 300 pounds of marijuana from the CI for delivery in Indiana, and Loret's customer [Eley] was to pay cash for the marijuana on delivery in Indiana.

Subsequently Moyer, the CI, came to Indianapolis in the custody of law enforcement officers along with the vehicle containing the marijuana. The CI told Special Agent Cates that he was delivering the marijuana to Hartley and "Phil" (who later turned out to be defendant Phillip Loret) and that "Tom" [Eley] was the buyer. The CI was to receive $5,000 and a vehicle in return for his delivery of the marijuana to Indianapolis. Hartley was a federal fugitive wanted in El Paso, Texas, and by the state of Colorado on drug charges and was thought to be possibly carrying a firearm. Cates ascertained that neither Hartley nor Loret was a resident of Indiana. Through monitored telephone calls between the CI and Hartley, the DEA agent learned that the CI's delivery of the marijuana was to occur at a farmhouse near Indianapolis. On February 14, 1994, Hartley and Loret flew to Indianapolis where Eley picked them up in his Lincoln and drove them to his home outside Indianapolis. Eley said he had the cash to pay for the marijuana.

Through still more monitored telephone calls between the CI and Hartley, it was learned that they agreed to meet at a motel. Consequently, officers rented a motel room for the CI at Motel 6 in Indianapolis, and he parked his car containing the marijuana in the motel parking lot. The CI waited in the motel room for Hartley,

Loret and possibly others to arrive to pick up the marijuana, and officers maintained surveillance outside the room. A few hours later they saw Eley's Lincoln Continental with Indiana plates and three occupants, including Hartley, arrive at the motel parking lot. Hartley left the vehicle and went to the CI's room where Loret joined them shortly afterwards. The driver of the car, who turned out to be defendant Eley, remained in his vehicle. Officers overheard a conversation in the motel room in which Hartley told the CI that they would take his vehicle with the marijuana and return to the motel in an hour with the money and a car for the CI. Thereafter defendants and the CI went to the parking lot. Loret got into the vehicle containing the marijuana while Hartley returned to Eley's Lincoln. As the Lincoln began to leave with Eley at the wheel, Loret, Hartley and Eley were arrested. In a pat-down search the arresting officer found a vial of cocaine in Eley's breast pocket.

Immediately after the arrest of the three suspects, an officer searched the trunk of Eley's Lincoln and found a large bulk scale. The car was taken to the Drug Enforcement Administration office where a second search was conducted. During this search, Agent Cates found a leather bag containing $30,000 in cash. The bag was concealed in the trunk of the car behind the carpet. The vehicle was registered to defendant Eley and was subsequently returned to him. At the trial, the discovery of the $30,000 in cash and bulk scale was admitted against defendants.

While Hartley, Loret and Eley were in a holding cell after their arrest, they discussed what story they could concoct to explain their presence in the motel. Eley said

he could explain the scale by saying he sold fertilizer. He told the others that he had $30,000 in cash with him in the vehicle. They decided to explain the presence of the cash with the story that Loret and Hartley were in Indiana to buy emus, Australian birds resembling an ostrich! However, Hartley concluded that such a story would not fly and told his co-conspirators it looked bad for them.

Analysis

The government argued that there was probable cause to search the vehicle and that the automobile exception permitted the search without a warrant. The district court agreed. It is well settled that no warrant is required for the search of an automobile if the officers have probable cause to believe it contains contraband or evidence of a crime. *California v. Carney,* 471 U.S. 386, 392. Here the officers knew that two persons who were not from Indiana were to arrive at the Indianapolis motel to pick up marijuana and were to pay the CI driver $5,000 and a car for delivering it. It was known that one of the two suspects, Hartley, was a convicted felon and fugitive and therefore might be in possession of a firearm, often used in drug trafficking. Therefore they had cause to believe that Hartley, Loret, or Eley's car in which all three had arrived would have cash and possibly a firearm. It was also reasonable for them to believe that other tools of drug trafficking such as a scale or ledgers would be in the vehicle.

Since the officers had been told by the CI that the first part of the marijuana transaction was to occur in a

farmhouse near Indianapolis, they could reasonably conclude that there would be a third conspirator with Loret and Hartley when they came to the motel because they knew neither Loret nor Hartley was from Indiana. In fact, Eley did accompany them in his car when they arrived at the motel. In the motel room, Loret and Hartley told the CI that they would take the CI's vehicle containing the marijuana and would soon return with money and the car promised him. Of the two known suspects, Hartley and Loret, after the conversation in the motel Loret returned to the CI's vehicle containing the marijuana and Hartley returned to Eley's vehicle.

At this juncture, it was obvious that Loret and Hartley were involved in the conspiracy and Eley does not contest probable cause to arrest him since he had lent his house to Loret and Hartley and driven them in his Lincoln from the airport to his house and later to the motel, and a vial of cocaine was found on his person. Since they had probable cause to arrest the three occupants of the Lincoln for drug trafficking, they also had probable cause to search every part of the vehicle and its contents outside the motel. *United States v. Ross*, 456 U.S. 798, 825. The second search of Eley's vehicle at the Drug Enforcement Administrative office was also permissible. *Ross*, 456 U.S. at 807 n.9; *Chambers v. Maroney*, 399 U.S. 42, 47-52; *United States v. Rivera*, 825 F.2d 152, 158 (7th Cir. 1987).

Exclusion of Hartley's other bad acts

Three days before the trial, the government filed a motion *in limine* to restrict defendants' cross-examination of Hartley about his involvement in marijuana activities

in Louisiana. The motion stated that Hartley would rely on his Fifth Amendment privilege against self-incrimination if questioned about the federal investigation of his alleged marijuana violations there. As we recently decided, a trial court may exclude cross-examination of evidence that the witness committed other uncharged crimes. *United States v. Nelson*, 39 F.3d 705, 709-710 (1994). Here such a cross-examination would be an attempt to impeach Hartley's credibility with evidence of other crimes. Such is considered clearly collateral to core issues protected by the Sixth Amendment. *United States* ex rel. *Ashford v. Director, Illinois Department of Corrections*, 871 F.2d 680, 683 (7th Cir. 1989); see also Rule 608(b) of the Federal Rules of Evidence. Hartley was subjected to extensive cross-examination, even longer than his direct testimony. His motive to lie was thoroughly explored by defense counsel, who showed the jury that Hartley was a twice-convicted drug dealer and had every motive to lie. Nevertheless, the jury chose to believe him, as was its prerogative.

Instruction on mere presence

The district court instructed the jury that "Mere presence at the scene of an event * * * does not necessarily establish proof of the existence of the conspiracy * * *." Loret attacks this instruction on the ground that it included the word "necessarily." However, he has not established that the verdict would have been different without this word. *United States v. Goines*, 988 F.2d 750, 773 (7th Cir. 1993). Moreover, the court gave another instruction on mere presence without the word "necessarily" and stated, "Mere presence at the scene of a crime

or knowledge that crime is being committed, standing alone, is not sufficient to establish defendant's guilt." Consequently, the jurors must have realized that they would have to find more credible evidence than Loret's mere presence at the arrest scene to convict him. In any event, there was overwhelming evidence from which the jury could find him guilty beyond a reasonable doubt. Therefore he has not established that inclusion of the word "necessarily" in one jury instruction deprived him of a fair trial. *United States v. Kenny*, 5 F.3d 214, 216 (7th Cir. 1993).

Finally, the evidence showed that Loret was attempting to drive away from the motel in a car loaded with marijuana, that he used a pager to communicate with the conspirators and was involved in the conspiracy from inception. Similarly, Eley was shown to be Loret's Indiana marijuana customer who brought the scale to weigh the marijuana and had picked up Loret and Hartley at the airport and later driven them to the motel to facilitate the crime. Therefore the use of the word "necessarily" did not deprive him of a fair trial.

The judgment is affirmed.

United States District Court

for the

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	NO. IP 94-44-CR-03
THOMAS J. ELEY,	)	
Defendant.	)	

Entry for April 12, 1994

Honorable S. Hugh Dillin, Judge

Court convened at 1:30 P.M. for the purpose of a hearing on the defendant's Motion to Suppress Evidence on the above entitled cause.

Appearing in person were Donna Eide, Assistant U.S. Attorney for the plaintiff and the defendant, Thomas J. Eley, with counsel, Robert Hammerle.

The defendant's counsel made an oral motion for separation of the witnesses. Court GRANTED said motion.

Plaintiff presents evidence and rests.

Defendant presents evidence and rests.

Closing argument heard.

Probable Cause of the defendant is DENIED by the Court.

Copies to:

United States Attorney
(Donna Eide)

United States Marshal

United States Probation

Robert W. Hammerle
501 Indiana Avenue, Suite 200
Indianapolis, Indiana 46202-3199

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	CAUSE NO. IP 94-44-CR
	)	Indianapolis, Indiana
-vs-	)	April 12, 1994
	)	
THOMAS J. ELEY,	)	
	)	
Defendant.	)	

Before the

HONORABLE S. HUGH DILLIN

TRANSCRIPT OF MOTION TO SUPPRESS

APPEARANCES:

For the Government:	Office of the United States Attorney Donna L. Eide, AUSA 5th Floor, U.S. Courthouse Indianapolis, IN 46204
For the Defendant:	Robert W. Hammerle 501 Indiana Avenue Indianapolis, IN 46202
Court Reporter:	Thomas A. Richardson, CM 255 U.S. Courthouse Indianapolis, IN 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND
COMPUTER-AIDED TRANSCRIPTION

[p. 2] INDEX OF EXAMINATION

GOVERNMENT'S WITNESSES	DX CX RD RC RDC RCC
MICHAEL CATES	3 15 21 22
MARK ROBINETT	23 27
TOM TUDOR	27 32
RICHARD KENNEY	35 40
MICHAEL CATES	41 43 48

[p. 3] THE COURT: All right. Mr. Hammerle, your motion.

MR. HAMMERLE: Yes, sir. Ms. Eide and I have talked. I believe the government is prepared to proceed, your Honor.

THE COURT: All right.

MS. EIDE: The government calls Special Agent Cates.

GOVERNMENT'S WITNESS, MICHAEL CATES, SWORN

DIRECT EXAMINATION

MR. HAMMERLE: Excuse me. At this time I believe there are several witnesses in the court. If we could move for a separation of witnesses.

THE COURT: Okay. That will be granted.

BY MS. EIDE:

Q State your full name, and spell your last name for the record, please.

A Michael Cates, C-A-T-E-S.

Q You are employed as a special agent with the DEA?

A Yes, ma'am.

Q And you are the officer assigned to the investigation that resulted in the arrest of Philip Loret, Mr. Hartley, and a Thomas Eley?

A That's correct.

Q When did you begin your investigation?

A February 14th, 1994.

[p. 4] Q What happened on that date?

A I was contacted by the resident agent in charge, DEA, Springfield, Missouri.

Q What did that agent tell you?

A He related to me details concerning a traffic stop by the Missouri Highway Patrol in which an individual was arrested upon discovery of approximately 340 pounds of marijuana in that individual's car.

Q That was in what state?

A Missouri.

Q As a result of that stop, the individual who was driving the car agreed to cooperate with officers; is that right?

A That is correct.

Q And did the individual tell those officers where he was going with the marijuana?

A Yes, ma'am.

Q Did they relay that information to you?

A Yes.

Q What did they tell you?

A The marijuana was destined for an individual identified as Gene Hartley. And it was to be delivered to Indianapolis, Indiana, being the marijuana in question.

Q And I will call this guy a confidential informant. Did the confidential informant tell you – what else did the [p. 5] officer, the resident agent, relay to you at that time?

A He stated to me on February 9th, of 1994, that the CI had been approached by an individual identified as Gene Hartley and was given a business proposition in which the CI would deliver approximately 340 pounds of marijuana at that time to a location in Indianapolis, Indiana.

Q When the CI was approached by Hartley, was anybody else present?

A An individual only identified at that time by the CI as Phil, last name unknown.

Q Where did this meeting occur?

A In the state of New Mexico.

Q Did the CI take him up on the proposition?

A Yes, he did.

Q So he agreed to do what?

A He agreed to transport marijuana from the state of New Mexico to Indianapolis, Indiana. And for that, he would be compensated $5,000 United States currency.

Q When you were told this information by the resident agent, what did you do?

A At that time, we decided with the CI's cooperation to initiate a controlled delivery of the marijuana to individuals in Indianapolis, Indiana.

Q So did the CI come to Indianapolis then?

A Yes, ma'am.

[p. 6] Q What about the marijuana and the car he was driving?

A The marijuana was transported in the same vehicle in which the CI had been arrested, along with two law enforcement officers from Springfield, Missouri to Indianapolis, Indiana.

Q And did you at some point meet this CI?

A Yes, ma'am.

Q And the officers accompanying him?

A Yes, ma'am.

Q Where did you meet him?

A Here in Indianapolis, at the DEA office here in Indianapolis.

Q On what date was that?

A That was on February 15th, 1994.

Q Did you talk to the CI at that time?

A Yes.

Q What was the substance of the conversation?

A That the CI had been instructed that upon arriving in Indianapolis, that the CI was to place a phone number on a 1-800 Sky Pager number or if he received no return call to call a phone number with a 504 area code which is a Louisiana area code.

Q Were you able to determine to whose number that was, the 504 area code number?

A Yes, ma'am.

[p. 7] Q Who was that?

A Philip Loret.

Q Did the confidential informant do what he was supposed to do? Did he call the number?

A Yes, ma'am.

Q And did you monitor the telephone call?

A Yes, ma'am.

Q What was the substance of the call?

A The informant advised the individual who was identified to us as Gene Hartley that the CI was not feeling well. And at that time, the CI was directed by Hartley to get a hotel room and at that time contact Hartley again so that they could then have a meeting occur.

Q Did the CI then get the hotel room?

A Yes, ma'am.

Q Who selected the area for the hotel?

A That was selected by myself and other law enforcement officers.

Q What area was selected?

A The Motel 6 on the west side of Indianapolis off of Lynhurst.

Q Was a room rented?

A Yes, ma'am.

Q In the name of the CI?

A Yes.

[p. 8] Q About what time was the room rented?

A I would say approximately early afternoon.

Q Now, did anything else happen after you rented the room?

A Prior to the CI renting the room, a body transmitter had been placed on the CI's person for monitoring any conversations that would occur.

Q What happened? Did you go with the CI into the room?

A Yes, ma'am.

Q Did he place any other calls?

A He placed one telephone number to the Sky Pager number. And after a period of time, we – we had not received any return number. We were hesitant to

remain in the room due to the fact that we had put the hotel room number in as well as the hotel phone number.

So at that time, the decision was then made to vacate the room being there was only one entrance and one exit, that being the front entrance to the room being on the ground floor. And surveillance would be maintained on that room.

Q So basically you were afraid since you put the room number in, they might show up at the room unannounced?

A That is correct.

Q During the course of your talking to the confidential informant and talking to the agent in Missouri, was there [p. 9] any discussion as to who was going to pick up the marijuana?

A Gene Hartley also believed that an individual – that a person identified earlier by the CI as Phil would also be there at the meeting as well. So at least two individuals.

Q Was there a discussion as to where they were going to take the marijuana?

A Discussion was made that it would be taken to a farmhouse hear Indianapolis. But no direct or no specific address was given at that time.

Q Did you have information as to whether or not Loret or Hartley lived in Indiana at the time?

A I have no idea whether he was a resident or they were ever residents of Indiana.

Q What evidence did you have as to where they lived?

A Bureau of Motor Vehicles.

Q What did you find out?

A And also through our NADDIS and IDACS – that's our files – we had no references to Mr. Hartley ever being a resident in Indiana. And Mr. Loret maintains a residence in Louisiana.

Q Were you able to find out anything else about either Loret or Hartley before they arrived?

A Mr. Hartley was wanted by the United States Marshals on a fugitive warrant.

[p. 10] Q What was that warrant for?

A One was for a parole violation stemming from a marijuana arrest in 1985. Another was for a marijuana trafficking charge, separate marijuana trafficking charge, by the Golden, Colorado Police Department.

Q So you knew before they arrived that Hartley was wanted on a federal parole violation for drug trafficking and on another warrant out of Colorado?

A That is correct.

Q And what was the nature of the charges on the warrant out of Colorado?

A It was also marijuana trafficking.

Q Did you discuss – before you went out to the hotel area, did you have a meeting with the other officers you had asked to help you on the surveillance?

A Yes, ma'am, there was a debriefing.

Q What did you discuss at that debriefing?

A At this time, I advised the other officers of the individuals who I believed to be involved, at that time Gene Hartley. And also we had at that time substantial information that Philip Loret was the individual whom the CI had identified as Philip. And also we discussed at that time the fact of Hartley being a fugitive. I also related information by Springfield, Missouri DEA that through the CI, comments had been made as Hartley being associated with [p. 11] weapons, carrying handguns, and advised them that there is a strong possibility of Hartley being armed.

Q Did you discuss or consider whether or not these people would be bringing anything with them?

A The fact that the CI was to be paid $5,000 also.

Q The CI told you he was to be paid $5,000 from these people?

A That is correct.

Q At the time of delivery?

A Not – perhaps at the time of delivery. But we were not certain as to whether it would be the time of delivery or not.

Q All of these things, were they discussed in the debriefing?

A Yes, ma'am.

Q Was there discussion as to how many people you expected to appear?

A I stated to the officers there would be probably two, perhaps more. But at that time, I could not state as to a certainty of that.

Q After you left the CI in the hotel room and they had placed the pager number in the hotel room to Hartley it was?

A Yes, ma'am.

Q What happened?

[p. 12] A A short time thereafter – I'm not certain as to the time, shorter than an hour – through the body transmitter placed on the CI's person, we overheard a phone ring in the CI's room. The CI was heard to converse with an individual. And the CI hung up a short time thereafter.

I contacted the CI via telephone at which time he advised me that Hartley had contacted him and stated he was on the far side of Indianapolis and would not be able to meet him at his hotel room until approximately one and a half hours after the phone call.

Q Did you instruct the CI to do anything?

A I instructed for him to wait until such time as the individuals would arrive.

Q What did you and the other officers do then?

A Maintained surveillance on the entrance to the CI's room as well as maintain surveillance on the vehicle containing the marijuana which was located in front of the CI's room but across from the entrance. It wasn't directly in front of the CI's room but rather on the other side of the parking lot.

Q So in the car that was parked in the parking lot in the hotel area; is that correct?

A Yes, ma'am.

Q It was parked a distance from but in the same parking lot facing the CI's hotel room?

[p.13] A Yes, ma'am.

Q The CI's hotel room was on the first floor?

A Yes, ma'am.

Q Were you able to get a clear view of the door from the parking?

A Yes. I myself wasn't. But other officers had maintained surveillance on both the car and the entrance to the room.

Q Had you caused surveillance officers to be stationed in the general parking lot area then?

A Yes, ma'am.

Q Then did something happen at about 4:00?

A Yes, ma'am.

Q What happened?

A A vehicle, a Lincoln Continental, was observed by surveillance officers to proceed to the area where the marijuana contained in the vehicle was located. It pulled up a short distance away from the vehicle containing the marijuana at which time one individual was observed to exit.

Three individuals were identified in the vehicle at that time, two in the front and one in the rear. One

individual was identified to leave and proceeded to the CI's room at which time he entered the room.

A short time thereafter, a second individual was seen [p. 14] to leave the vehicle and enter the room as well. The first individual was identified as being Gene Hartley. The first individual that exited the vehicle proceeded to the CI's room.

Q You weren't able to see all this yourself, is that right?

A No, ma'am.

Q You know this from overhearing this on the radio?

A From overhearing on the radio and being told by surveillance officers, yes.

Q Why don't you summarize what you understood happened. And then we will have, your Honor, other witnesses who actually saw it so you can get a quick overview.

A Hartley was observed to –

THE COURT: There has been a separation of witnesses. The people in the back, I don't know who these two people are. You are not witnesses, are you?

UNIDENTIFIED INDIVIDUALS: No.

A Mr. Hartley was observed by surveillance officers. As the vehicle pulled up, three individuals were in the car. Hartley was the first person to exit the vehicle, proceed to the CI's room, and enter the room.

A short time thereafter, a second individual identified as Philip Loret was identified to leave the room and to leave the car and also enter the room.

[p. 15] A short time thereafter, the CI, Loret, and Hartley were observed to exit the CI's room, stand outside for a short period of time, after which Loret then proceeded to walk over and enter the vehicle containing the marijuana. And Mr. Loret – Mr. Hartley then proceeded back to the Lincoln Continental in which he had arrived in.

At that time, all the individuals were then placed under arrest.

MS. EIDE: I don't have any other questions for this witness.

CROSS-EXAMINATION BY MR. HAMMERLE:

Q Agent Cates, you testified that the CI gave information he met with two people in New Mexico?

A Yes.

Q Those two people were identified as Mr. Hartley and Mr. Loret; is that true?

A At the time the CI new [sic] the individual only as Phil but later subsequently was identified as Philip Loret.

Q So we're talking about the two people that the agent met in New Mexico were definitely Loret and Hartley?

A Yes, sir.

Q And was it also true that the CI gave information that Hartley told the CI?

THE COURT: Is that another witness?

[p. 16] MS. EIDE: Not to my knowledge, no.

Q At some point, Mr. Hartley told the confidential informant that Philip Loret was his "money man," did he not?

A That is correct.

Q What type of car was it that drove into the Motel 6 parking lot containing the three individuals?

A Lincoln Continental.

Q Lincoln Continental?

A Yes, sir.

Q Prior to that time, you had received no information from any source in regard to Mr. Eley, the defendant here; is that correct?

A That is correct.

Q And the money – the issue about when the CI was to be paid his $5,000, let's go back to that. There was a conversation in New Mexico between the CI and Mr. Hartley in regard to how the CI was going to be paid; is that true?

A That is correct.

Q And I didn't quite understand what the CI was told in New Mexico. What was that?

A The CI was to be paid $5,000 upon delivering the marijuana to Indianapolis.

Q And was there any conversation subsequent to that conversation as to how and when the CI would be paid the [p. 17] $5,000?

A No, sir.

Q Was he also to receive an automobile?

A Yes, sir.

Q And which automobile was the CI to receive as payment for his participation in this activity?

A The vehicle containing the marijuana.

Q You testified here on direct that there was a discussion at some point in time – there was a discussion with the confidential informant with at least Mr. Hartley about a farmhouse?

A Yes, sir.

Q And when did that discussion occur?

A There's a discussion – Mr. Hartley had related to the CI something to the area that the marijuana was to be delivered to a location being a farmhouse.

Q Was to be delivered by who?

A That was never specifically addressed.

Q When did this conversation occur between the CI and Mr. Hartley?

A In New Mexico.

Q In New Mexico?

A Yes, sir.

Q Was it your understanding that the CI had been told he was to drive the marijuana to Indianapolis and deliver it [p. 18] to a farmhouse?

A That was never clarified. There was a possibility of him doing that, but it was never for sure definite what he would do.

Q At any rate, the CI was directed to the motel. And this was an arrangement that you came up with; is that correct, or it was an arrangement that you decided upon?

A The CI had told Mr. Hartley that he was not feeling well, and he was lost in Indianapolis. So at that time Mr. Hartley stated to the CI to get a hotel room and then at that time contact Hartley again so there could be a meeting that would occur.

Q Now, at the Motel 6, when the Lincoln drove in containing the three individuals, were you able to identify who was sitting – who was driving and who was sitting and in what position?

A Yes, sir.

Q Would you please state that.

A Mr. Eley was the driver.

Q That's the defendant Thomas Eley here?

A Yes. Mr. Hartley was in the front, and Mr. Loret was in the rear.

Q And where was the CI's vehicle in relationship to the room he was occupied?

A His hotel room, being a Motel 6, they are all in [p. 19] compartments. So that they are all in blocks.

Q One story?

A Yes, sir. Well, it was a multi-story, but he was on the ground floor. The car containing the marijuana was directly in front of the entrance to his room but across the other side of the parking lot.

Q And was that automobile – was the front or the rear of that automobile closest to the CI's room?

A The rear.

Q The rear?

A Yes, sir.

Q So whoever got in that car would have to back out to pull out?

A Yes, sir.

Q Now, where did the Lincoln pull in when it arrived?

A As to be exactly specific, I can't state. Within I would say five to six parking spaces, but I can't provide you specific information for sure.

Q Did it pull into the parking place immediately adjacent to the car of the CI or did it pull into a parking place across the parking lot and closer to the Motel 6 rooms?

A It was nearby. But it was not adjacent to the car containing the marijuana.

Q But it did not pull right next to it, the CI's car?

A I do not believe so.

[p. 20] Q And it did not pull directly up in front of the CI's room, did it?

A No, I don't believe so.

Q You testified here – a couple more questions. You testified that as the Lincoln pulled up, that Mr. Hartley got out of the car and went into the CI's room?

A Yes, sir.

Q And then Mr. Loret got out of the Lincoln and went to the CI's room?

A Yes, sir.

Q And all three came out front?

A Yes, sir.

Q Were you able to tell if the CI was still maintaining a story that he was not feeling well? Were you aware he was still doing that at that time?

A Yes, sir, he was stating he was not feeling well.

Q How were you aware that he was making those claims?

A Through the body transmitter, we had heard – due to the quality, it was very hard to understand. For the most part, later on, he had told us he had stated this to the individual; that he was not feeling well.

Q And at any rate, when the CI, Loret, and Hartley came out of the CI's room, Mr. Eley was still sitting in the Lincoln?

A That is correct.

[p. 21] Q Now, was there also a conversation at about that time, the fact that – or did either Hartley or Loret tell the CI they were going to take the CI's car and they would be back in an hour and a half with the CI's money and the car?

A Yes, sir.

Q And when did that conversation occur?

A That occurred in the CI's room or just as the CI was outside. It was when all three were meeting at that time.

Q And who made that statement to the CI?

A Hartley.

Q Hartley did?

A Yes, sir.

Q And then if I understand you correctly, Hartley got into the Lincoln that had Mr. Eley behind the wheel?

A Yes, sir.

Q And Mr. Loret got into the CI's car?

A Yes, sir.

Q And they were all arrested at that time; is that true?

A Yes, sir.

MR. HAMMERLE: Thank you. I have no further questions, your Honor.

REDIRECT EXAMINATION BY MS. EIDE:

Q What kind of license plates did the Continental have?

A Indiana license plates.

[p. 22] Q Were you able to identify to whom the vehicle was registered?

A Yes, sir.

Q Who was that?

A To Thomas Eley.

MS. EIDE: No further questions.

THE COURT: What was it Hartley said there at the last about taking the marijuana and paying him off later or something?

A The CI had stated while in the hotel room to Hartley that he was not feeling well. And at that time, Hartley then related to the CI that he would take the vehicle containing the marijuana to a location approximately one and a half hours away from the hotel room and would return at that time with the money for the CI as well as the vehicle.

THE COURT: Okay. Thanks.

MR. HAMMERLE: If I may, Judge.

RECROSS-EXAMINATION BY MR. HAMMERLE:

Q Did Mr. Hartley tell the CI that he would take the vehicle to a place an hour and a half away or that he would take the car and return within a total elapsed time of an hour and a half?

A Within an elapsed time of an hour and a half.

[p. 23] MR. HAMMERLE: That's all I have, your Honor. Excuse me. I'm sorry.

Q You say the Lincoln was registered to Mr. Hartley or Mr. Eley. Was that determination made prior to the arrest or after the arrest of Mr. Eley?

A After.

Q Excuse me?

A After.

MR. HAMMERLE: Thank you. Nothing further.

MS. EIDE: No further questions unless the Court has any.

THE COURT: No, I don't have any. That's all. Thank you.

GOVERNMENT'S WITNESS, MARK ROBINETT, SWORN

DIRECT EXAMINATION BY MS. EIDE:

Q What is your name, sir?

A Mark Robinett.

Q Spell the last name, please.

A R-O-B-I-N-E-T-T.

Q Where are you employed?

A I am employed with the United States Marshal's Service, Indianapolis, Indiana.

Q In what capacity?

A As a Deputy United States Marshal, criminal [p. 24] investigator.

Q Are you assigned to any special section or assignment?

A I am the enforcement specialist for the district of Indianapolis. I'm in charge of the warrant squad here in Indianapolis.

Q And were you so employed in February of 1993?

A I was.

Q '94?

A I was, also.

Q And 1994 as well?

A Yes, I was.

Q On February 15th, 1994, did you become involved in an investigation that resulted in the arrest of Eugene Hartley and two other individuals?

A Yes, I did.

Q And when did you become involved in that investigation?

A I became involved approximately 5:00 p.m. on a Monday night when I received a call from Special Agent Michael Cates.

Q And what did he – why was he calling you? Did he say?

A Special Agent Cates advised me that the Missouri State Police had arrested a person in Missouri who was

carrying approximately 350 pounds of marijuana and that the source of supply or the person that the marijuana was to be delivered to here in Indianapolis was a possible federal [p. 25] fugitive wanted by the U.S. Marshals out of El Paso, Texas.

Q Did he give you the name?

A Yes, he did. At that time, he gave me the name of Gene Hartley.

Q Did you run a check to see if there was a fugitive warrant out for Gene Hartley?

A Yes, I did. I contacted our headquarters in D.C., had them run an inquiry through one of our databases which is known as the WIN, Warrant Information Network. They ran an inquiry on Eugene or Gene Hartley. And they came back with a parole violation warrant that was active out of El Paso, Texas.

Q What was he on parole for?

A For importation of marijuana.

Q And did you find any other information concerning Mr. Hartley?

A Yes, I did. According to the information from the WIN system, they had placed Mr. Hartley into WIN and NCIC as a caution indicator, indicating that Mr. Hartley was assaultive; that he had prior weapons offenses; that he had prior narcotics offenses; and that he was a pilot.

Q Did you find any other information as to other warrants concerning Mr. Hartley in your investigation?

A Yes, I did. Shortly after obtaining Mr. Hartley's date of birth and Social Security number, I ran Mr. Hartley [p. 26] through the NCIC system. And I got a positive hit for a warrant which was outstanding out of Golden, Colorado.

Q What was that warrant for?

A That was also for a violation of something to do with marijuana.

Q And then on the next day, were you invited to the debriefing at the DEA office before the arrest occurred?

A Yes, I was.

Q Do you recall generally who all was there?

A Yes, I do. Special Agent Michael Cates was there. Special Agent Bill Birkofer from the United States Customs Service was there along with myself and the U.S. Marshal Service. Supervisor Deputy U.S. Marshal Larry Ely was there. Investigative Aide Rick Graham was there. And there were approximately six narcotics officers from the Indianapolis Police Department.

Q Did you discuss at that time what you had learned about Mr. Hartley?

A Yes, we did. There was a full briefing conducted. Photographs were shown. Criminal histories on those people that we thought were going to be involved were discussed, including the information that Mr. Hartley had prior weapons offenses and was assaultive.

Q Did you discuss the possibilities there might be weapons involved there?

[p. 27] A Yes, we did.

Q After that, did you join the group when they went out to the hotel and did the surveillance?

A Yes, I did.

MS. EIDE: I don't have any further questions of this witness.

CROSS-EXAMINATION

BY MR. HAMMERLE:

Q Mr. Robinett, how are you?

A Pretty good.

Q The briefing that took place at the DEA in which there was a full briefing, was there any mention of Mr. Eley of any kind, of Thomas Eley at that DEA briefing?

A Not at the briefing before the arrest, no, sir.

Q And you were told by Agent Cates when you were first contacted about this case that the person to whom the pot was to be delivered was a Mr. Hartley?

A That is correct.

MR. HAMMERLE: I have nothing further, your Honor.

MS. EIDE: No redirect.

THE COURT: That's all. Thank you.

GOVERNMENT'S WITNESS, TOM TUDOR, SWORN

DIRECT EXAMINATION

BY MS. EIDE:

Q What is your name, sir?

[p. 28] A Tom Tudor.

Q How do you spell the last name?

A T-U-D-O-R.

Q And where are you employed?

A I am a police officer with the City of Indianapolis.

Q Assigned to any section?

A Currently assigned to the narcotics branch where I have been for a little over five years.

Q What is your rank?

A I'm a detective.

Q And did you become involved in the investigation that resulted in the arrest of three individuals including Thomas Eley in February of 1994?

A Yes.

Q When did you become involved in that investigation approximately? Was it the day of the arrest?

A Yes, it was.

Q What happened that day? Where did you go?

A I was contacted by Special Agent Cates from DEA to see if we could assist him with an investigation that he was conducting, went over to the DEA office, and was debriefed by Agent Cates at that location.

Q Were there other officers there at the debriefing?

A There were several other DEA agents. There were troopers I believe from Missouri. And a couple of other [p. 29] IPD officers were there.

Q After the debriefing, were you just generally told what they expected to happen?

A Yes.

Q After the debriefing, did you all go out to the Motel 6?

A Yes.

Q And did you establish surveillance in the parking lot there?

A Yes, I did.

Q What did you observe during your surveillance?

A During the surveillance, the hotel room, I was positioned approximately 30 to 40 feet from the room on the parking lot of the hotel.

Q You knew at that time which room the confidential informant was in?

A Yes, I did. During the course of surveillance, I observed a large model older Lincoln Town Car pull in approximately three or four doors down from the room that the CI was in.

Q How many people were in the vehicle?

A I could tell there were three people in the vehicle.

Q Did any of them meet the description that you had been given of the people in the debriefing?

A The subject who was in the front passenger seat got out [p. 30] of the vehicle first. During the debriefing back at DEA, I was shown a photograph by one of the U.S. marshals of a subject they were looking for that might be involved in this who was wanted on a federal warrant.

Q Now, you were sitting in a car with another officer?

A I was sitting there with Sergeant Wilkinson.

Q You were able to observe the car pull in and park; is that right?

A Yes, that's correct.

Q You able to maintain constant surveillance on that vehicle?

A Yes, I did.

Q What happened? What did you see?

A The subject in the front passenger seat got out of the Lincoln and went directly to the door where the CI was at. It was during that time I was close enough that the subject matched the description of the photograph that I reviewed earlier by the U.S. marshals.

Q The fugitive?

A Yes, that's correct.

Q And then what happened?

A At that point, the passenger in the rear seat got out of the vehicle and also met with the first subject who got out of the car and went into the room as well.

Q And did they stay in the room?

[p. 31] A A short time, probably less than a minute.

Q While the first person I guess now we know is Hartley went in there, the second individual in the back stayed in the car; is that right?

A Yes.

Q The driver stayed in the car?

A That's right.

Q Did you see the driver have any conversation with the person in the car?

A I could see the driver was turning around.

Q And then the second person who was in the back seat who is later identified as Loret got out?

A That's correct.

Q After they both came out of the hotel room, what did you observe?

A The CI was with both subjects when they came out of the hotel room. Hartley went back to the Lincoln. Loret walked back with a CI to the vehicle.

Q And what happened after they got to their respective vehicles?

A Hartley got back in the vehicle. Loret got back into the other vehicle and was getting ready to start the car when we were advised by the radio to go ahead and secure the individuals.

Q And did the Continental start to drive away as well?

[p. 32] A The Continental had backed up and started to go westbound and was blocked by one of our vehicles. And we came in from the other side to block it from the rear.

Q And you did not arrest Eley; is that right?

A No, I did not.

Q Someone else did?

A That's correct.

MS. EIDE: No further questions.

CROSS-EXAMINATION

BY MR. HAMMERLE:

Q Detective Tudor, at the briefing that you testified to attending, you were shown pictures of Mr. Hartley or an individual that turned out to be Mr. Hartley; is that true?

A That's correct.

Q Were you shown pictures of anybody else?

A No, I was not.

Q When you arrive at the Motel 6, you were sitting in an automobile with a Sergeant Wilkinson; is that true?

A That's correct.

Q Do you remember the room number that the CI was in?

A I don't remember the room number. I know where the room is. It was the last room on the end of the lower level that there was a corridor.

Q Was that on the east end or west end of the Motel 6; do you recall?

[p. 33] A About right in the middle of the the [sic] way it's shaped.

Q But it was an end room?

A It was an end room, yes.

Q Where was the CI's automobile parked in relation to the room occupied by the CI?

A Almost directly across the parking lot in the same lot as the hotel.

Q So if you were looking out from the CI's front door to his automobile, you would – the car was parked facing away from his room; is that correct?

A That's correct.

Q Now, there were open parking places in front of the CI's room, were there not, when the older model Lincoln pulled in?

A There were several. A truck had pulled in almost directly in front of the CI's room and I believe another vehicle. There were a couple of spaces. When the Lincoln pulled in, there was a couple of spaces before you could get to that room that were open.

Q And the Lincoln that pulled in, did it pull in and park next to the CI's car which was parked facing away

from the CI's room or did it pull into a parking place with the front of the Continental facing the CI's room? Do you understand my question?

A Yes. When the Lincoln Continental pulled in, it pulled [p. 34] in facing the hotel. That would have been in a southbound direction. The CI's car was facing northbound.

Q Now, how far was the Continental from the CI's room?

A How far?

Q Yes. What would be be [sic] your estimate?

A No more than two or three rooms.

Q Two or three rooms?

A Yes.

Q How far was it from the CI's automobile?

A Just cattycorner across the lot. It's not a very big lot.

Q About how far would that be?

A Fifteen feet maybe.

Q Now, are you sure that Hartley was in the front seat of the Continental and not Loret when it pulled into the parking lot?

A Hartley was in the front passenger seat.

Q And you're certain of that?

A Yes, I am.

Q Hartley got out of the Continental. And Loret then got out of the back seat. And they both went into the CI's room?

A No. At first, Hartley went into the CI's room first. And then a short time later, there was some conversation. He came back out, and Loret got out of the car. And they [p. 35] both went back into the CI's room.

Q And I believe you testified that the driver of the Continental remained inside the Continental right up to the time he was arrested; is that true?

A That's true.

Q And you say it backed out. Let me ask you about this. Prior to the Continental being stopped, where did it actually move and go?

A It backed up which would have been northbound and started to proceed which would have been westbound and probably didn't go any more than ten feet.

Q Whose automobile stopped the Continental? Was that yours?

A It was a combination. Ours was in the rear. And I believe it was another IPD officer that stopped it in the front.

MR. HAMMERLE: Thank you. I have no further questions, your Honor.

THE COURT: Anything else?

MS. EIDE: No, your Honor.

THE COURT: That's all. Thank you.

GOVERNMENT'S WITNESS, RICHARD KENNEY, SWORN

DIRECT EXAMINATION

BY MS. EIDE:

Q What is your name, sir?

[p. 36] A Richard Kenney, K-E-N-N-E-Y.

Q And where are you employed?

A Narcotics detective with the Indianapolis Police Department.

Q Were you working as a detective in February of 1994?

A Yes, I was.

Q Did you become involved in the investigation and subsequent arrest of an individual named Thomas Eley?

A Yes, ma'am.

Q And that occurred on what, February 15th?

A I believe so, yes, ma'am.

Q Were you asked to assist by a DEA officer agent?

A That's correct.

Q And as a part of that assistance, did you attend a briefing at DEA before you went out on surveillance?

A Yes.

Q Were you present when there was discussion as to a fugitive named Eugene Hartley?

A Yes, ma'am.

Q After you attended the briefing, did you go out to the Motel 6 in Indianapolis?

A Yes.

Q And did you set up surveillance at the hotel?

A Yes, I did.

Q Where were you situated with regard to the room or [p. 37] where the confidential informant was?

A Myself and Sgt. Swarm were in an unmarked pickup truck directly west of the hotel in a Denny's parking lot.

Q Were you able to see directly a Continental pulling into the parking lot at about 4:00?

A No.

Q Did you hear the fact that someone had pulled in over the radio?

A Yes, ma'am, I did. Another surveillance team who had a visual on them gave us that information over the police radio.

Q Did you continue to hear what was going on over the police radio?

A Yes, ma'am.

Q At some point, were you given instructions to do something?

A Yes.

Q When was that and what were you told?

A Approximately 4:15 or thereabouts, we were told that the subjects in question had arrived, a target vehicle had arrived, and to move in and attempt to effect an arrest.

Q And did you do that?

A Yes, ma'am.

Q Who did you do?

A Sgt. Swarm pulled around the motel and pulled directly [p. 38] behind a Lincoln Continental and blocked it in. I got out of the vehicle. And I went to the driver side of the Lincoln and approached the subject, opened the door. I told him I was a narcotics officer and to step out of the vehicle.

Q Did he do so?

A Yes, ma'am.

Q Is that person present in the room today?

A Yes.

Q Can you identify him?

A The gentleman in the jail shirt sitting with counsel.

Q After he got out of the car – this is Mr. Eley, is it not?

A Yes, ma'am.

Q After he got out of the car, what happened?

A I directed him to the rear of the vehicle. And I told him I was going to search him for my safety to make sure he didn't have any weapons.

Q Did you do that?

A Yes, I conducted a pat-down search.

Q Did you find anything as a result of that pat-down search?

A As I was patting down his top left breast pocket, I felt a cylinder-type object, small cylinder type-object that was hard.

[p. 39] Q Did you remove that?

A Yes, I did.

Q And what was it?

A It was a 35 mm. film canister.

Q How long have you been a narcotics officer?

A Seven years.

Q And have you run across these film canisters in connection with your narcotics investigations?

A Yes, ma'am, I have numerous times.

Q In what way?

A On numerous search warrants, I have found a lot of times people will keep their narcotics stashed in these empty film canisters.

Q Did you open the canister?

A Yes, ma'am, I did.

Q What did you find inside, if anything?

A There was a white powdery substance inside I believed to be cocaine.

Q Did you later test it?

A Yes, I took it directly to the narcotics vault of the Indianapolis Police Department property room; and it was sent to the Indianapolis Forensic Laboratory and tested positive for cocaine, extract of coca.

Q Was Mr. Eley then placed under arrest?

A Yes, he was placed under arrest at that time.

[p. 40] Q Was the rest of the car searched after that?

A Yes, it was.

Q You didn't conduct a search; is that right?

A No, ma'am.

MS. EIDE: No further questions.

CROSS-EXAMINATION BY MR. HAMMERLE:

Q Detective Kenny, when you pulled in, you say you pulled in behind the Continental to block it?

A Yes, sir.

Q And so it was still parked in the parking spot where it had arrived to your knowledge?

A Yes, sir, as far as I know. That's where I was sitting.

Q But it was still parked in a parking space facing the hotel, was it not?

A It was facing away from the room.

Q Facing away from the room?

A Yes.

Q But still parked?

A In the lot.

Q And parked in one of the parking spots?

A Yes, sir.

Q You were told to approach the car and effect an arrest. That was the purpose of blocking the car in, was it not?

[p. 41] A Yes, sir.

Q When you told Mr. Eley to get out of the car, did you do anything with the car keys or do you know what happened to the car keys?

A No, sir, I don't. I didn't have anything to do with the car or the car keys.

Q And if I understood it correctly, you weren't present when the – you did not personally search the automobile itself?

A No, sir, I didn't.

MR. HAMMERLE: I have nothing further, your Honor.

MS. EIDE: No further questions.

THE COURT: Okay. That's all. Thank you.

MS. EIDE: I will call Special Agent Cates to talk about the search of the car.

GOVERNMENT'S WITNESS, MICHAEL CATES, PREVIOUSLY SWORN

DIRECT EXAMINATION

Q Special Agent Cates, after the people were pulled out of the car, they were all arrested?

A That is correct.

Q Did you actually arrest anyone?

A No, ma'am.

Q Did you come to the scene then? You were on the scene?

A That's correct.

Q And as a result of – after the arrest, was the vehicle [p. 42] in which Eley and Hartley were sitting searched?

A Yes.

Q What was found during the search?

A In the back passenger area of the trunk was found to be a cardboard box found to contain a large number of garbage bags. Also in the rear, in the trunk area of the Lincoln Continental, was found to be a plastic bag that was partially opened that was found to expose a large mechanical bulk scale.

Q Bulk scale?

A Yes, ma'am.

Q After those items were found, what happened in the car?

A The car was then taken to the Drug Enforcement Administration office here in Indianapolis.

Q At that location, did you or someone else at your direction conduct a further search of the vehicle?

A Another special agent and myself conducted a more detailed search of the vehicle.

Q Did you find anything else?

A Yes, ma'am.

Q What did you find?

A Behind a carpet divider on the right side of the trunk of the vehicle was found to be a brown leather bag found to contain a large sum of United States currency.

Q Approximately how much?

[p. 43] A $3,000.

Q All in cash?

A Yes, ma'am.

Q Anything else?

A Again, we found the bulk scale in the trunk.

Q Same one you found that you saw?

A The same one that was there we discovered earlier at the time of the arrest. No, ma'am, there was nothing else.

MS. EIDE: No further questions.

CROSS-EXAMINATION BY MR. HAMMERLE:

Q Where was Mr. Eley at the time the car was searched at the Motel 6?

A The arrest had just gone down. So Mr. Eley was still at the premises at the time.

Q And how close to the automobile, do you recall?

A Since I was not there at the time that the trunk was opened, I can't definitively state it was such and such distance away. I know he was there at the site. That's all I can tell you specifically.

Q Were you aware at the scene at the Motel 6 that there was some type of drug supposedly found on Mr. Eley?

A I was informed by Mr. – Detective Kenney they had found a white powdery substance on his person, yes.

Q You were told that at the scene?

[p. 44] A Yes, sir.

Q Was that before or after the search of the trunk?

A Again, I really can't stay definitively because I was told by another officer that they had found the bulk scale in the trunk.

So as to the sequence, whether this white powder was discovered after the officer had found the bulk scale, I can't tell you for sure how it happened.

Q You testified at a detention hearing in this case, didn't you?

A Yes.

Q In regard to Mr. Eley?

A Yes, sir.

Q Do you recall as to – well let me ask you this: You made no mention of any allegation of white powder being found on Mr. Eley?

A Right.

Q Do you recall why at a detention hearing you made no mention of that?

A We were not charging him at that time with possession of marijuana – I mean possession of cocaine.

Q Did you order the agents to effect an arrest in the stop of the automobiles?

A Yes, sir.

Q And were they also ordered at that time to effect a [p. 45] search of the automobile, the Continental?

A No, sir. It was conducted without my supervision. It was a cautionary search looking for weapons in the vehicle.

Q Were you present when the search of the automobile was made?

A Initially, no.

Q Who made that search of the automobile?

A I can't tell you definitive who the officer was that searched the trunk of the car.

Q Do you have any records that indicate who would have searched the trunk of the car initially?

A I just remember being informed of it at the time.

Q At the time when you first got to the scene?

A Yes, sir.

Q Was the trunk open at that time? By the trunk, I mean the trunk of the Continental.

A I don't believe so.

Q Was the Continental still parked in the parking place where it had originally pulled in?

A The Continental was at the place – was still at the point at the time the arrest had been made, yes.

Q Was that at the identical location where it had originally pulled in and parked when Mr. Hartley and Mr. Loret got out?

A I can't testify to that because I wasn't there to say.

[p. 46] Q Was it in a parking place as opposed to being in the middle of the parking lot?

A I don't believe it was still in a parking spot.

Q Do you remember for sure?

A No, sir.

Q At that time, at the scene, the record will reflect there was no arrest warrant or search warrant for either Mr. Eley or the Continental at the time of the initial search at the Motel 6, was there?

A That is correct.

Q Now, at that time, there was a search of the trunk and there was a scale found in – that was in some type of bag?

A Yes, sir.

Q And you saw the bag. Obviously someone had looked at that prior to you arriving at the scene, correct?

A Yes, sir.

Q And again you don't remember who pointed that scale out to you or who was the one that opened that trunk?

A No, sir, I don't.

Q Do you know how entry to the trunk was gained?

A No, sir

Q Did you participate in a further search of the automobile at the Motel 6 when you arrived at the scene?

A There was no further search. It was then transported into our office here in Indianapolis.

[p. 47] Q And how long did it remain at your office prior to this second search.

Q [sic] Maybe six, seven hours.

Q And I take it that there was no search warrant for the automobile at the time of the second search?

A That is correct.

Q And Mr. Eley was in custody and being held at that time, was he not?

A Yes, sir.

Q Did you have the keys at that time to the Continental?

A Yes, sir.

Q And is that how you got into the trunk the second time at DEA headquarters was by using the keys?

A Yes, sir.

Q Can you tell me what was the purpose of this second search?

A We were conducting an inventory search of the vehicle with the belief we would possibly be seizing it.

Q And I take it if the purpose was an inventory, did you prepare a list, an inventory list, of what was found in the automobile?

A Of things that – well, the vehicle was then returned. I have a list of what of the two items we had taken out of the vehicle being the scale and the money. Everything else remained in the vehicle.

[p. 48] Q Everything else remained in the vehicle?

A No. Excuse me. Let me state that there were some papers removed from the vehicle.

Q Papers removed from the vehicle?

A Yes, sir.

Q Did you make a list of what was found in the vehicle pursuant to your inventory search?

A No. But I have the items so that a list may be compiled.

MR. HAMMERLE: I believe that's all I have, your Honor. Thank you.

REDIRECT EXAMINATION BY MS. EIDE:

Q Special Agent Cates, why wasn't the vehicle seized?

A At that time, the assessed value of the vehicle did not warrant moving for it to be seized.

MS. EIDE: No further questions.

MR. HAMMERLE: Nothing further on that.

THE COURT: Okay. That's all.

MS. EIDE: May I have a moment to discuss this with Mr. Hammerle?

THE COURT: Sure.

MS. EIDE: We're going to see if any of our witnesses were the first to open the trunk.

THE COURT: Okay.

[p. 49] MS. EIDE: Apparently none of those officers were the first to open the truck. I don't think it's relevant, but I wanted Mr. Hammerle to have that information. None of them opened it first.

AGENT CATES: Nor do they recall which one did it.

THE COURT: Okay. Is that all?

MS. EIDE: That's it.

MR. HAMMERLE: We have no evidence to present, your Honor.

THE COURT: Okay. Do you want to argue it?

MS. EIDE: Your Honor, I will be happy to brief it with case law backing it up if the Court wants. I believe there are several bases upon which the officers could have searched the vehicle. The first one being simply they had probable cause to arrest all of the people at the arrest.

And you have the vehicle which is driving – which is containing the coconspirators at the scene of the crime. And with the vehicle exception, I believe the case law is very strong that they would have probable cause with the vehicle exception to search the car at the scene for any evidence to substantiate the crime.

And the kind of evidence they would be looking for here is, of course, guns, them believing that Hartley might have a gun; and guns are commonly used by drug traffickers; money, they understood they were supposed to have $5,000 in [p. 50] cash to pay the confidential informant, and any other evidence of drug trafficking such as scales.

The second basis upon which they could have searched the vehicle was a search incident to the arrest of Mr. Eley. Once they found the cocaine on him, they also had probable cause to arrest Mr. Eley I think based on the totality of the circumstances.

I would just remind the Court that the standard for probable cause is a totality of the circumstances based on the officers' knowledge at the time and shouldn't be second-guessed by judicial officers or legal people, you know, sometime after it.

In this case, they have obviously a conspiracy to distribute marijuana. And they have people arriving, picking up the load, and driving away with it. There is probable cause to believe all three of them are involved with it. I think the Court knows from its experience people don't generally have uninvolved people driving them to and from the scene to pick up a large load of marijuana like that.

So we have probable cause to search the vehicle based on the totality of the circumstances, probable cause to arrest Mr. Eley based on the totality of the circumstances, certainly probable cause to arrest Mr. Eley after they find the cocaine on his person. And they have probable cause to [p. 51] seize the car under the civil forfeiture statute because it's plain the car, regardless of Mr. Eley's involvement, was used to facilitate the drug crime by bringing the coconspirators to the place to pick up the marijuana.

So we have several bases upon which they could have searched the vehicle. Once they searched the vehicle, obviously anything they find that's readily inincriminating [sic] would be subject to seizure.

THE COURT: Thank you.

MR. HAMMERLE: I, likewise, if the Court wishes, would brief these issues again if the Court decides that. But our argument is simply this: that at the time of the stop that was made, we're arguing there was no probable cause to arrest Mr. Eley; that you have heard the evidence as to what he is observed doing, driving up and sitting in the car as these other people went inside and came back out. But equally so, based upon that, we

would argue that any subsequent search would be a violation of the Fourth Amendment.

Secondly, that even if they had the ability or the probable cause to arrest him, that this business of searching this closed container, we're talking about buying the allegation if there is probable cause for anything else, there is probable cause to be involved in 300 some pounds marijuana delivery.

[p. 52] In a film canister they find in his pocket, that also – to say they would be able to search that without a warrant at that time of seizing it, we would argue the contents of that were illegally seized in violation of Fourth Amendment.

But more significantly and to get at the heart of the matter, the fact is that the Court has not heard evidence yet as to who actually searched the trunk. But it's clear that the decision was made to arrest Mr. Eley without a warrant. The decision was made to search the trunk without a warrant. That was done. A scale was found.

And we would argue that, obviously, the warrant requirement is still one that must be adhered to as a general principle unless there is an exception.

I'm well aware that has been lessened if not weakened entirely in some ways in regard to automobiles. But, nonetheless, when you have the individual out of the car and arrested, we would simply argue that the search of the trunk under the circumstances that you have heard, that the government has not sustained a burden of showing an exception as to how and why and what reason that trunk was searched without a warrant at the scene.

However if the Court should decide that there was probable cause to arrest Mr. Eley, that the little film canister and contents are admissible, and even if the Court [p. 53] should decide that anything searched at the scene was also admissible, we would argue strongly that the subsequent search at the DEA headquarters some six or seven hours later is in violation of the Fourth Amendment.

As Agent Cates testified, it was pursuant to some inventory purpose where an inventory was not made of the contents. Some things were taken out, and still no inventory is being made. We would argue strongly that alleging an inventory search was the basis or reason for going into the car was a pretext to go back in and look at it without a warrant, when a warrant could easily have been obtained.

They have not stated or offered any procedures that the DEA may or may not have in regard to effecting an inventory search. Clearly though if you have do an inventory, then you ought to have an inventory as a result of it.

That not being the case, we would argue the government has not sustained their burden of showing there was an exception to the warrant requirement. We would argue in piecemeal to grant the motion in full and, in the alternative, grant those portions the government has not sustained their burden on. Thank you.

MS. EIDE: May I respond, your Honor?

THE COURT: Yes.

MS. EIDE: Just briefly. Once they found the [p. 54] scales in the – well, once they saw what the car was

being used for, before they even found the sales [sic], before they searched the car, the car was subject to seizure. The case law is very clear when you have probable cause in a vehicle exception, a vehicle out on the road, a seizure can be effected without a warrant.

Certainly once they pulled Mr. Eley out of the car, they had – they certainly had reasonable cause to pat him down. They knew they had a fugitive who is known to be armed and dangerous. They would would [sic] have been obviously remiss in their duties if they hadn't patted down everybody there and searched the car because they had very good reason to believe there would be firearms in there.

They certainly had a reason to conduct the search which resulted in the seizure of the cocaine. Once they arrested him for the cocaine, the car would have had to have been impounded. So the fact it was again searched later doesn't matter. At that time, they had a right to have the car; and they were in lawful possession of it. They could search it as many times as they wanted at that point. The fact it was later returned because it didn't meet the equity requirements for forfeiture really doesn't have any bearing on the issue.

Again, I would just emphasize the probable cause standard in this case. What the officers knew at the time [p. 55] and what the facts showed was there was probable cause to believe these three people were involved in a conspiracy, and that car containing those three people would probably have some evidence of the crime.

Based on that, they had authority to search that vehicle whether or not they arrested Eley. And they certainly

had the probable cause to search the vehicle and to arrest Mr. Eley for the marijuana trafficking.

THE COURT: Well, I believe they had probable cause to make the arrest. They had the testimony of the confidential informant as to what was supposed to take place. Then they heard over the KEL set or whatever it was the conversation with Hartley about coming to pick up the material and so on.

I think it's quite clear that when Hartley and the man from Louisiana showed up chauffered [sic] by Mr. Eley, I think it's quite clear that all three of them were joined together in a conspiracy to pick up the marijuana. And so there was probable cause to make the arrest and I think certainly probable cause to search the car they were in when they were arrested. So I will deny the motion to suppress.

(I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.)

/s/ Thomas A. Richardson
Thomas A. Richardson
Official Court Reporter

_____
Date

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

May 22, 1995.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DONALD E. WALTER, District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 94-3148 vs. 94-3190 THOMAS J. ELEY and PHILLIP J. LORET, Defendants-Appellants.	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 94 CR 44 S. Hugh Dillin, Judge.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by Thomas J. Eley on May 5, 1995, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* The Honorable Donald E. Walter of the Western District of Louisiana is sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff	)	**CAUSE NO. IP 94-44-CR**
-vs-	)	Indianapolis, Indiana
PHILIP JOSEPH LORET and THOMAS ELEY,	)	July 11, 1994
Defendants.	)	

Before the

HONORABLE S. HUGH DILLIN
and a Jury

EXCERPT OF PROCEEDINGS AT TRIAL
VOLUME I OF II

APPEARANCES:

For the Government:	Office of the United States Attorney Christina McKee, AUSA Donna L. Eide, AUSA 5th Floor, U.S. Courthouse Indianapolis, IN 46204
For the Defendant: Philip Joseph Loret	Symmes Voyles Zahn Paul & Hogan James H. Voyles Mark C. Webb Suite 700 One Virginia Avenue Indianapolis, IN 46204
For the Defendant:	Robert W. Hammerle 501 Indiana Avenue Suite 200 Indianapolis, IN 46202

Court Reporter: Thomas A. Richardson, CM
255 U.S. Courthouse
Indianapolis, IN 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND
COMPUTER-AIDED TRANSCRIPTION

[p. 192] A. It was stored there temporarily until such time it could be taken in possession by the Indianapolis Police Department for analysis.

MS. McKEE: I will give the jury a moment to finish with those.

Q Agent Cates, did you conduct a search of the 1978 Lincoln by Eley?

A Yes, ma'am.

Q Tell the jury what, if anything, you found in that car.

MR. HAMMERLE: Your Honor, I would renew the motion made pretrial, reassert it at this time of the same reasons.

THE COURT: I will overrule the objection.

A Further located in the back passenger space of the vehicle was found to be a cardboard box found to contain a large number of garbage plastic bags.

Q Let's start with those garbage bags. Based on your training and experience as a DEA agent, what is the purpose of those garbage bags in the marijuana business?

MR. HAMMERLE: I will object as calling for speculation as to what common garbage bags could be used for, if anything.

MS. McKEE: It's calling on him to express an opinion based on his training and experience.

* * *

[p. 225] When you got to the scene with the Lincoln, was the trunk open?

A I don't remember that, sir. I was not in a position – I do know that the Continental was there, but I cannot say if it was open or not.

Q Are you aware of the trunk being gone through at the scene by various police?

A I know the trunk was opened.

Q Who opened it?

A I do not know. It was a law enforcement officer.

Q Who searched it?

A I was informed that scales were found in the back. I told him, whoever the officers were, to close the trunk. I did not order a further search on it.

Q Do you know how long that trunk remained open at the scene?

A I do not.

Q Let me ask you this: You stated here that when you got to the scene, that the Lincoln was parked in basically the middle of the parking lot? Is that true?

A Toward the middle. I can't say for sure if it was in the middle. But I knew it was not in a parking spot.

Q And you're absolutely positive it wasn't in a sparking [sic] spot?

A Absolutely positive.